1-29-2013

State v. Dobbs Respondent's Brief Dckt. 39267

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 39267
Plaintiff-Respondent,	)	
	)	Canyon Co. Case No.
vs.	)	CR-2011-468
	)	
SHANE LEE DOBBS,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

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STATEMENT OF THE CASE

Nature Of The Case

Shane Lee Dobbs appeals from the judgment of conviction entered upon the jury verdict finding him guilty of felony driving under the influence with a persistent violator enhancement. Dobbs claims the district court erred in overruling his objection to a statement made during the prosecutor's rebuttal argument.

Statement Of Facts And Course Of Proceedings

Officers responded to a report of an altercation at Dobbs' residence. (Trial Tr., p.31, L.20 – p.32, L.10.) When officers arrived, they saw smashed glass in the living room, blood on several walls, and the back door appeared to have been kicked inward. (Trial Tr., p.33, L.1 – p.35, L.16.) There was also a blood trail leading out to the shed and blood on the open shed door. (Trial Tr., p.35, Ls.22-24.) However, there was nobody at the residence. (Trial Tr., p.35, L.17 – p.36, L.5.) Further investigation revealed that the male and female who lived in the home (Dobbs and his girlfriend), left in a vehicle. (Trial Tr., p.36, Ls.6-22.)

Approximately 20 minutes later, Dobbs' vehicle was located on Highway 44 and Deputy Heather Leavell conducted a traffic stop with the assistance of Corporal Paul Maund. (Trial Tr., p.37, L.10 – p.39, L.13, p.48, L.23 – p.49, L.2.) In talking with Dobbs, Corporal Maund noted an odor of alcohol coming from Dobbs' "facial area." (Trial Tr., p.58, Ls.11-24.) Corporal Maund asked Dobbs whether he had been drinking and Dobbs responded that he had had a "couple" of 24-ounce beers "at least two hours" prior but had not eaten since that morning.

(Trial Tr., p.61, Ls.4-19, p.62, Ls.1-4.) Corporal Maund also noticed Dobbs had red, glassy eyes. (Trial Tr., p.62, Ls.5-9.) Based on his suspicions that Dobbs may have been driving under the influence, Corporal Maund decided to administer field sobriety tests. (See Trial Tr., p.63, Ls.5-7.)

In preparing to administer the field sobriety tests, Corporal Maund asked Dobbs whether he had any injuries, suffered any recent head trauma, or wore glasses or contacts. (Trial Tr., p.62, L.12 – p.63, L.4.) Dobbs claimed he had a knee injury but denied recent head trauma or vision correction. (Trial Tr., p.62, L.12 – p.63, L.5.) Corporal Maund administered the horizontal gaze nystagmus test and, in lieu of the one-leg-stand and walk-and-turn tests, which Corporal Maund did not administer due to Dobbs' claimed physical impairments, Corporal Maund had Dobbs perform the English alphabet and number count tests. (Trial Tr., p.63, L.13 – p.64, L.19.) Dobbs failed the horizontal gaze nystagmus, scoring the maximum number of six decision points. (Trial Tr., p.70, Ls.17-22.) Dobbs likewise failed the number count test, but correctly recited the alphabet from C to Q as he was asked. (Trial Tr., p.71, L.18 – p.74, L.12.)

Fifty minutes after the traffic stop was initiated, Corporal Maund conducted breathalyzer testing. (Trial Tr., p.77, L.1 – p.79, L.24, p.96, Ls.7-11.) Dobbs' BAC test results were .083 and .086. (Trial Tr., p.96, Ls.7-11.)

The state charged Dobbs with felony driving under the influence and a persistent violator enhancement.[1] (R., pp.29-34, 53-54.) The jury found Dobbs guilty of both felony DUI and the enhancement. (R., pp.93, 123-24.) The court

[1] The state also charged Dobbs with driving without privileges, which he pled guilty to prior to trial. (See R., p.6; 6/20/2011 Tr., p.6, L.8 – p.12, L.2.)

imposed a unified 15-year sentence with five years fixed. (R., pp.131-32.) Dobbs filed a timely notice of appeal. (R., pp.133-136.)

ISSUE

Dobbs states the issue on appeal as:

> Did the district court err by overruling Mr. Dobbs' objection during rebuttal argument because the prosecutor committed misconduct by misstating the evidence?

(Appellant's Brief, p.8.)

The state rephrases the issue on appeal as:

Has Dobbs failed to establish the district court erred in overruling his objection to the prosecutor's rebuttal argument given that the prosecutor's argument was not objectionable?

ARGUMENT

Dobbs Has Failed To Show The District Court Erred In Overruling His Objection To One Of The Prosecutor's Statements During Rebuttal

A. Introduction

Dobbs claims the district court erred in overruling his objection to a statement made during the prosecutor's rebuttal argument. (Appellant's Brief, p.9.) Dobbs' claim of error is premised on the assertion that the prosecutor misstated the evidence during her argument. Because Dobbs has failed to show error in the prosecutor's statement, he has necessarily failed to demonstrate that the district court erred in overruling his contemporaneous objection.

B. Standard Of Review

"Due process issues are generally questions of law, and this Court exercises free review over questions of law." Kootenai Medical Center ex rel. Teresa K. v. Idaho Dept. of Health and Welfare, 147 Idaho 872, 216 P.3d 630 (2009) (citations and quotations omitted).

A defendant who claims the prosecutor engaged in misconduct has the burden of proving such. State v. Ellington, 151 Idaho 53, 59, 253 P.3d 727, 733 (2011) (citing State v. Perry, 150 Idaho 209, 227-28, 245 P.3d 961, 979-80 (2010)). If the alleged misconduct is followed by a contemporaneous objection, and if the reviewing court finds error, the error is reviewed under the harmless error standard. Id. (citing Perry at 227, 245 P.3d at 979).

C. Dobbs Has Failed To Show The District Court Erred In Overruling His Objection To A Statement Made During The Prosecutor's Rebuttal Argument Since The Objected-To Statement Did Not Constitute Misconduct

Dobbs testified at trial that, after he and his girlfriend got in a fight at their house, they went to his friend Chris Caudle's house. (Trial Tr., p.209, Ls.10-24.) Despite what he told Corporal Maund about his alcohol consumption that evening, at trial Dobbs testified that he stayed at Chris' house for "under an hour" and, while he was there and letting his dog outside, he saw some whiskey on the kitchen counter with a disposable red Dixie cup conveniently located nearby. (Trial Tr., p.209, L.25 – p.211, L.15.) Dobbs testified he was "pretty upset" and decided to drink "some whiskey." (Trial Tr., p.211, Ls.14-15.) Dobbs said he did not feel intoxicated when he left Chris' house, but he started feeling the effects of the alcohol "a little ways into . . . the traffic stop" that happened after he left Chris' house to go home. (Trial Tr., p.212, Ls.3-13.) When asked why he told Corporal Maund a different story about his alcohol consumption, Dobbs responded: "because I thought that if I told an officer while I'm pulled over on the side of the road I just barely took a couple shots of whiskey, how is that going to sound? I was incredibly scared." (Trial Tr., p.215, Ls.6-10.)

The prosecutor, in her initial closing argument, responded to Dobbs' trial testimony, stating:

> At Chris', Chris didn't see him drink.[2] He now claims that he drank there. This is his greatest friend, and he was upset, he just

[2] Chris was called as a witness by the state and testified that he never saw Dobbs drink at his house. (Trial Tr., p.141, Ls.16-19.) However, Chris noted he leaves his whiskey on the kitchen counter such that it was possible Dobbs could have had some. (Trial Tr., p.141, Ls.19-23.)

had a fight, and he didn't drink with his friend? His friend didn't see him drink? That doesn't make sense.

. . .

From the beginning, [Corporal] Maund sees signs of investigation -- sees signs of intoxication, sees bloodshot, glassy eyes and smells the odor of alcohol on him. [Dobbs] can't pass the divided attention tests. And he utterly fails the nystagmus test. You know that he didn't drink for the 50 minutes of the stop. You know that he had an empty stomach. Even if you believe that he chugged whiskey and immediately got in the car, you know, scientifically, that whiskey had been absorbed at that time. So you know his blood alcohol level was dropping.

The defendant would have you believe that he played beat the clock and chugged a bunch of whiskey and then raced home so that he could get home before he was too drunk? That doesn't make sense . . ..

(Trial Tr., p.231, L.7 – p.232, L.14.)

Counsel for Dobbs then argued, in relevant part:

The State is trying to convince you that because of -- the breath test in this case, it was over the legal limit, they broke the plane of the goal line. Where was the ball, though? The ball is back there when he was driving. Okay? The State doesn't have to prove that he was over the legal limit when he took the test, that [sic] he was over the legal limit when he was driving, some 50 minutes before.

Now, you've seen a lot of evidence. You've seen the graph of absorption and elimination. You've heard a lot of testimony about how reliable the instrument is. However, it takes, as [Mr. Johnston, the forensic scientist] testified to, a sample at a specific moment in time.

Now, we've talked about absorption, elimination, what are the possibilities going back 50 minutes. It is entirely possible that my client's alcohol concentration at the time he was driving was well above what it was when he took the test. It's also possible that it was significantly lower at the time he was driving than when he took the test. The only way to really know for sure is where my client is on this absorption and elimination graph. No one can tell you where he was. Even he can't tell you were he was. It's a

> guess. For you to find my client guilty of driving with an alcohol concentration of .08 or greater at the time he was driving, you have to guess.

(Trial Tr., p.235, L.2 – p.236, L.6.)

The prosecutor responded in rebuttal with some of the same arguments made in her initial closing:

> The Defense is asking you to speculate on a lot of information. You are to use your reason and common sense to evaluate the evidence that is before you. You know that he had an empty stomach. You know that he either stopped drinking two hours before, or that he chugged a bunch of alcohol and then got in the car, if you choose to believe that. You know that all of -- either one of those, all that alcohol was absorbed by that point. His blood alcohol was dropping. You know that.

(Trial Tr., p.242, Ls.12-22.)

At this point, defense counsel objected, asserting: "There's no foundation for that statement." (Trial Tr., p.242, Ls.23-24.) The court overruled the objection. (Trial Tr., p.242, L.25.)

On appeal, Dobbs argues the district court erred in overruling his objection to the prosecutor's rebuttal argument, claiming the prosecutor misstated the evidence. (Appellant's Brief, pp.9-10.) More specifically, Dobbs contends the prosecutor "committed misconduct by misstating the evidence when she asserted that it was a known fact that Mr. Dobbs' blood alcohol level was higher at the time of the stop than it was when he participated in the test." (Appellant's Brief, p.11.) Although that is not what the prosecutor actually said, even accepting Dobbs' characterization of what was implied by the objected-to statement, "His blood alcohol was dropping," Dobbs' claim that this misstated the evidence is belied by the record.

Todd Johnston, a forensic scientist with the Idaho State Police, testified that breath test results "tell you how much alcohol is in [someone's] system at the time of the test." (Trial Tr., p.162, Ls.19-21.) When asked what the results "tell us about alcohol concentration at the time of a stop," versus the time the sample was taken, Mr. Johnston responded:

> Well, assuming that the officer that initiated the stop didn't allow the individual to drink after a first contact, the body, as soon as you start drinking alcohol, you start eliminating alcohol. So what I can tell you is that during the -- after the initial stop, assuming that they didn't consume any alcohol after that, their body is eliminating alcohol that entire time. So their true alcohol concentration would be higher than it was at the time of the test sometime later.

(Trial Tr., p.162, L.25 – p.163, L.11.)

Mr. Johnston's testimony supported the exact point of the prosecutor's statement: "His blood alcohol was dropping." Dobbs claims otherwise, arguing, "It is clear from [Mr. Johnston's] later testimony that this question assumed that a person had finished absorbing alcohol and had moved on to elimination." (Appellant's Brief, p.11.) Although Dobbs' brief contains a number of excerpts from Mr. Johnston's testimony (Appellant's Brief, pp.2-5, 10), he does not include any specific citation to Mr. Johnston's testimony in support of his argument that "later testimony" clarified "that this question assumed that a person had finished absorbing alcohol and had moved on to elimination" (Appellant's Brief, p.11). In any event, Mr. Johnston's testimony does not support Dobbs' claim.

At no time did Mr. Johnston qualify his express opinion that, assuming Dobbs had nothing to drink between the time of the traffic stop and the time the breath tests were administered, which he did not, Dobbs' alcohol concentration

would have been "higher than it was at the time of the test sometime later." And, notwithstanding Dobbs' assertions to the contrary, Mr. Johnston's testimony regarding the process of alcohol absorption and elimination did not serve to contradict or clarify that opinion in any manner, much less the manner suggested by Dobbs. The state can find no point in the transcript where Mr. Johnston testified that an individual first completes the absorption process before moving on to elimination. (See Appellant's Brief, p.11.) Rather, Mr. Johnston testified that "as soon as you start drinking alcohol, you start eliminating alcohol." (Trial Tr., p.163, Ls.4-5.) Mr. Johnston's testimony regarding absorption was simply that absorption is the process by which alcohol diffuses into one's body, and that absorption rates vary depending on how long the alcohol stays in the stomach, which is impacted by whether there is food in your stomach because there is no need to digest a liquid; if that is all that is in one's stomach, the stomach will "dump the contents into [the] small intestines very quickly, and [all the alcohol will] be fully absorbed . . . within about 20 minutes on an empty stomach." (Trial Tr., p.175, L.18 – p.177, L.6.) In other words, absorption, like elimination, is an ongoing process that occurs simultaneously; one does not, as Dobbs suggests, have to fully absorb all alcohol before "mov[ing] on to elimination." (Appellant's Brief, p.11.) In fact, "in order to get your alcohol concentration to rise, you have to consume alcohol faster than your body can metabolize it." (Trial Tr., p.163, Ls.16-18.) Nothing in Mr. Johnston's opinion was modified by his explanation of absorption and elimination.

Moreover, Mr. Johnston's discussion of absorption and elimination, based on the facts of this case, was entirely consistent with his opinion that someone in Dobbs' position would have a higher BAC when he was driving than when he provided the breath samples based on the absence of any additional ingestion of alcohol and average rates for complete absorption on an empty stomach. The prosecutor's objected-to statement was, therefore, an accurate comment based on the evidence and not, as Dobbs, claims a misstatement of the evidence. See State v. Severson, 147 Idaho 694, 720, 215 P.3d 414, 440 (2009) ("Generally, both parties are given wide latitude in making their arguments to the jury and discussing the evidence and inferences to be made therefrom.") (citations omitted). That Dobbs urged the jury to reach a different conclusion regarding Dobbs' BAC at the time he was driving (Appellant's Brief, p.11), did not make the prosecutor's comment improper or the district court's decision to overrule Dobbs' objection erroneous.

Even if the Court concludes the district court erred in overruling the objection the prosecutor's statement, this Court can conclude beyond a reasonable doubt that the prosecutor's single complained-of statement did not contribute to the jury's verdict. "[I]n order to find that the error was harmless and not reversible," the appellate court "must declare a belief beyond a reasonable doubt that the misconduct did not contribute to the jury's verdict." Ellington, 151 Idaho at 59, 253 P.3d at 733 (citing Perry, 150 Idaho at 227-28, 245 P.3d at 979-80).

Not only was the prosecutor's rebuttal argument essentially the same as her initial closing argument, to which Dobbs did not object, the court twice instructed the jury that closing arguments are not evidence. (R., pp.73, 107.) In addition, the objected-to statement related only to Dobbs' blood alcohol content; however, the state charged Dobbs with driving under the influence under two alternative theories: (1) that Dobbs was driving under the influence; and/or (2) that Dobbs had a BAC of .08 or more. (R., p.30.) The jury was instructed that it could find Dobbs guilty under either theory (R., p.101), and the complained of statement in no way implicates the non-BAC theory of guilt. That said, even under the theory that Dobbs was driving with a BAC in excess of .08, the evidence that Dobbs' BAC was higher at the time he was driving than when he was tested was strong given the information Dobbs provided to law enforcement at the time regarding what he had eaten that day (or not eaten), when and what he drank, and the scientific testimony of Mr. Johnston. The only potentially contradictory testimony was Dobbs' claim that he lied to the officers about when and what he drank, which was his self-serving and essentially uncorroborated claim that he drank whiskey at some unspecified time before getting in his car. Given the charge, the evidence presented, and the jury instructions, even assuming this Court finds error, the Court can easily conclude, beyond a reasonable doubt that the isolated, complained-of statement made during the prosecutor's rebuttal did not contribute to the verdict.

Because Dobbs has failed to establish the objected-to statement made during the prosecutor's rebuttal argument was improper, he has failed to

demonstrate the district court erred in overruling his objection. Even if Dobbs has met his burden of showing error, the alleged error was harmless.

CONCLUSION

The state respectfully requests that this Court affirm Dobb's judgment of conviction for felony driving under the influence with a persistent violator enhancement.

DATED this 29th day of January, 2013.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of January, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JESSICA M. LORELLO
Deputy Attorney General